# No. 12,324

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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AUDREY CUTTING and SYLVIA A. HENDERSON,

*Appellants,*

vs.

RAY BULLERDICK, et al.,

*Appellees.*

## APPELLANTS' REPLY BRIEF.

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## APPELLANTS' REPLY BRIEF.

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The appellees have filed herein a brief purporting to answer the points raised by the appellants. In this Reply Brief, appellants will only respond to those matters raised in the appellees' brief, which, in their opinion, warrant a reply.

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### I. APPELLANTS COMMENT ON APPELLEES' STATEMENT OF FACTS AND NECESSARY CORRECTIONS THERETO.

With reference to the second paragraph of appellees' Statement of Facts, it is necessary to point out that there was no substantial proof in the trial of the case or as reflected in the Transcript of Record,

of an escrow agreement between Sylvia Henderson and Ralph Thomas or that the deed, mortgage, note, etc., was placed in the Union Bank of Anchorage in escrow. On one occasion, the appellant Audrey Cutting testified (TR 255, commencing with line 13) that the property was purchased from Ralph Thomas for and on behalf of appellant's minor daughter, Sylvia A. Henderson, on a contract, and upon being questioned (TR 256) if she had the contract in her possession, she replied, "I do believe I have it but I don't know just where. It might be in my personal possessions." And that later, on cross-examination by Mr. Kay of Counsel for appellees, Mrs. Cutting testified (commencing with Line 18, TR 388) that she had made a search for the real estate contract in various places, including the Union Bank and the offices of her attorneys, McCutcheon and Nesbett, and even attempted to get in touch with the original vendor, Mr. Thomas, to ascertain whether he had a copy of the contract but was unsuccessful, and that again upon re-direct examination, commencing with Line 14, TR 390, further inquiry was made as to the search that was made for the so-called contract and that such interrogation ends on Line 13, TR 391. The record further shows that Mrs. Cutting continued the search and that eventually she found evidence of the true facts surrounding the purchase of the lot in question from Ralph Thomas to Sylvia A. Henderson and that commencing with Line 23, TR 409, she reveals that she found a copy of the mortgage signed by Sylvia Henderson, her minor daughter

to the said Ralph Thomas, and that thereupon she (Witness Cutting) realized for the first time since the inception of the real estate transaction that the conveyance from Thomas to Sylvia Henderson was handled by way of a purchase money mortgage and further testifies on direct examination commencing with TR 409 and ending with TR 424, as to the details surrounding the transaction and introduced into evidence the copy of the mortgage, together with the original note executed by Sylvia A. Henderson, and Audrey Cutting, the appellant, mother of Sylvia A. Henderson. And that further, commencing on TR 424, she was cross-examined by attorney for appellees, Mr. Grigsby, regarding the mortgage and the delivery of the deed to Sylvia Henderson prior to the mortgage and she (Witness Cutting) established the fact upon said cross-examination (Line 6, TR 429) that there was no escrow agreement. That henceforth, in the entire trial of the case, no further attempt was made on the part of the plaintiffs, (present appellees), to prove that there was, in fact, a contract, that said papers were placed in escrow at the Union Bank.

It is certain from a full reading of the Transcript of Record that the mother of Sylvia A. Henderson, the said Audrey Cutting, did not truly recollect the circumstances surrounding the original sale of the lot which had occurred some two years prior to this trial and that she had no conception whatever of the legal meaning of the word "escrow."

Appellants comment further with reference to appellees' Statement of Facts as to paragraph 6 wherein appellees state, as a matter of fact, that the only financial disagreement between the contractor Smith and Cutting was the sum of $500. While it is true that upon filing suit, the bankrupt Russell Smith sued for the sum of $10,500, it is not a fact that he only demanded $10,500 from the appellant Cutting and thus, paragraph 7, wherein appellees state that Russell Smith, the contractor, did not demand the sum of $13,500 as stated in appellants' brief but did demand the sum of $10,500 is not a statement of fact but is conjecture on the part of appellees arrived at by slanting the testimony sharply in favor of the bankrupt contractor, Smith. It is a fact that the total bill for materials and labor as supported by the lien claims of the laborers, in this record set forth on behalf of the appellees, and the lien claims of materialmen, represent a grand total of $11,533.76, and had Russell Smith applied to that figure, a reasonable contractor's fee for his time, effort and services, the total bill would have been at least $13,500 and therefore, it would seem that common business practice and the claims of the laborers and materialmen support the testimony of Audrey Cutting that the contractor did, in fact, make a demand upon her for $13,500. Appellant however does not rely entirely on ordinary business practice, plus the claim of the laborers and materialmen to support her statement that the contractor demanded $13,500 but it will be noted that the testimony of the contractor Smith was

so vague and ambiguous in all matters pertaining to the performance of this work that he was unable to even indicate the time (even to the month) when the work was finished, and that particularly with reference to the sum demanded, was unable to testify with any degree of certainty as to said amount. We call attention to the testimony of Smith commencing with Line 26, TR 337 and ending at the bottom of TR 338, which testimony is the only evidence, other than the evidence produced by Mrs. Cutting, as to the amount demanded and in this testimony the witness Smith has no conception as to what his records show and does not know whether the totals of his costs of labor and materials came to $10,500 or approximately $13,000. The testimony, however, of Audrey Cutting is specific on the subject both on direct and cross-examination. We call attention to her testimony on direct examination, Lines 6, 7, 8 and 9, TR 257, and upon cross examination where the witness testified (TR 258) that the contractor Smith billed her in the sum of $13,500 and stated further (TR 259) that Mr. Smith did not agree (after the house was ostensibly constructed) to accept $9800 because he was obligated to pay out $13,500 to various laborers and business people. Thus, it would seem that paragraph 7 of appellees' Statement of Facts is based entirely upon the ambigious and uncertain testimony of the contractor, Russell Smith, a witness whose credibility was impeached on many occasions throughout the Transcript of Record by his fellow witnesses, stating that his credit was no good, (Testimony of

Arthur Waldron, TR 251, Line 19) (Testimony of Harry Goudchaux, TR 517, Lines 23-26) (Testimony of Lyle Anderson, TR 327, Lines 5-28) and that he could not be trusted to pay his bills and that these other witnesses for the appellees, of which Russell Smith was one, in an effort to substantiate their own claims against the appellant, Audrey Cutting, destroyed any possible credit which might be extended to the testimony of the said Smith.

The last paragraph of appellees' Statement of Facts is also an erroneous statement and is not supported by the evidence adduced at the trial and as reflected in the Transcript of Record. In this paragraph, appellees state that at all events, nothing was paid on the contract and no amount offered or tendered by Audrey Cutting. We refer again to the testimony of appellees' witness, Contractor Smith, wherein the said Smith testified as follows (TR 333):

> "Q. Mr. Smith, in your complaint you have prayed for the sum of $10,500 for work done and materials and supplies furnished and services rendered, have you made demand on Mrs. Cutting here for this amount of money? A. No.
>
> Q. You have never asked her to pay?
>
> A. I have asked her a few times.
>
> Q. Have you ever received any money from the contract? A. No."

and that the witness Cutting on the question of tendering the money set forth in the contract, testified as follows (commencing Line 1, TR 357):

"(Testimony of Audrey Cutting)

Q. Did you ever receive a demand for payment?

A. He demanded his payment.

Q. Do you remember the date?

A. Payment was demanded shortly. We have all been rather confused just on the dates. That is why I asked you this morning as to what dates the liens had been put in on the property by the employees because it was ten days before that that payment had been asked for.

Q. Did he demand the total amount of $13,500?

A. Yes, and Mr. Smith indicated that he was giving me quite a bargain. He didn't include ten per cent contractor's fees and didn't include his own labor against the place.

Q. Did you offer at that time to give him the $9800 plus the $200 in full settlement in accordance with the terms of your contract?

A. I was willing to give him the $10,000 and explained what was going on out there that he had considerable work to straighten out besides the basement and I wanted that done before I made any payment of any sort.

Q. Have you always been ready, willing and able to pay it now?

A. Yes, sir.

Q. Are you ready to pay at any time?

A. Yes, at any time.

Q. Has he been able to explain in any way the reason for having exceeded the amount set forth in the contract?

A. No, except that it cost him more than he thought it was going to cost."

and that the witness Cutting further, on Mr. Grigsby's cross-examination, made a tender of the money due on the contract in open Court, providing that she was relieved of responsibility for the amount of the liens; and had appellees' counsel not attempted to hedge the tender with terms impossible for appellant to meet, the money would have been paid then and there. This testimony commences Line 26, TR 366 and continues to Line 25, TR 369, wherein appellant Cutting offers full settlement of Smith's claim by the following Monday morning, on condition that it would be accepted as full settlement of the contract price and would relieve her from the responsibility of paying the lien claims, which claims amounted in aggregate to nearly $12,000, but that counsel for appellees demanded that $10,000 be tendered into Court in settlement of the claim of Russell Smith only, and that under such terms and conditions, the appellant Cutting properly refused to bring the money into Court, but that then and there occurred a tender which cannot be denied by appellees and therefore, paragraph 8 of appellees' Statement of Facts is not supported by the evidence.

## ARGUMENT.

FIRST POINT RAISED: 1. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF COUNSEL FOR DEFENDANTS TO DISMISS AT THE CLOSE OF PLAINTIFFS' CASE ON THE GROUNDS THAT THE COMPLAINTS OF THE ORIGINAL PLAINTIFFS AND PLAINTIFF INTERVENORS DID NOT STATE GOOD CAUSES OF ACTION AGAINST THE DEFENDANTS.

SECOND POINT RAISED: 2. THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF DEFENDANTS' COUNSEL TO STRIKE THE LIEN CLAIMS FILED BY PLAINTIFFS AND TO DISMISS AT THE CLOSE OF PLAINTIFFS' CASE ON THE GROUNDS THAT THE LIEN CLAIMS DID NOT CONTAIN SUFFICIENT FACTS TO CONSTITUTE VALID LIENS AGAINST THE REAL PROPERTY OF SYLVIA A. HENDERSON.

(Note: Points One and Two will be considered together as one point.)

The appellants are in error in stating, in connection with this point, that the trial Court erred in denying the motion of counsel for defendants to dismiss at the close of plaintiffs' case on the grounds that the complaints of the original plaintiffs and plaintiff intervenors did not state good causes of action against the defendants, and appellants here concede that they did not move as above stated at the close of plaintiffs' case. This motion was not made until both plaintiffs and defendants had rested, but the appellants do assert here that the motion was made when both plaintiffs and defendants had rested and was made on the grounds that the complaints of the original plaintiffs and plaintiff intervenors did not state good causes of action against the defendants and that the lien claims filed by plaintiffs did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson. It will be

noted (TR 559) that counsel for appellants moved to dismiss because of failure—motion to dismiss on the grounds that the plaintiffs fail to state a good cause of action, and there appears in the record three asterisks, indicating that further statements and arguments in support of this motion were deleted from the printed record as it was not felt necessary to burden the record with further reference to the motion and the arguments in support thereof. However, counsel for one of appellees, Mr. Kay, inquired of the Court (Line 11, TR 559) as to whether the motion was denied as to all parties, to which the Court responded as follows:

> "All of the lien claims, as I understand, and therefore being denied covers all of the lien claims and the various complaints and the complaints of intervention. This motion, however, the question of jurisdiction, was never waived and defendant has a right to raise it at any time if he can during the main argument."

During this argument, and during the argument on the motion, appellants did challenge the adequacy of both the complaints and the lien claims and this fact, i.e. the motion to strike the lien claims, is supported by the oral opinion of the trial Court (Supp. TR, 582, Lines 7-11) wherein the Court said:

> "Question was raised as to the validity of the liens. I find that each and all of the liens are valid because they sufficiently comply with the law in our statutes upon the subject governing the matters which must be stated in the lien claims."

Thus, the Court indicated that the lien claims of appellees had been moved against and the Court left open to counsel for appellants the right to raise motions at any time during the arguments which have not been printed in this record and to move against anything which pertained to the question of jurisdiction. Appellants therefore stand on the points of law and argument cited in appellants' brief in support of these points, except as conceded by the above concession as to the time when the motion was made, and no further argument is now required in reply to these points.

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**SIXTH POINT RAISED: 6. THAT THE TRIAL COURT ERRED IN AMENDING SUA SPONTE AND BY JUDGMENT THE COMPLAINTS OF THE PLAINTIFFS SUFFICIENT TO MAKE GOOD CAUSE OF ACTION.**

It is necessary that appellants correct any erroneous presumption which might arise as a result of the filing of an answer on the part of the appellant Cutting, in which she admitted that she was the owner of that certain real property described as Lot 2 of Block 37-D, as specified by appellees on page 25 of appellees' brief. The original answer of the appellant Cutting was filed by counsel and verified by counsel for Mrs. Cutting while Mrs. Cutting was in California (TR 487, Lines 20 to TR 488, Line 11) and until the deed was actually produced in Court at the time of the trial, counsel was under the impression that Mrs. Cutting was the owner of the property

and that upon production of the deed and further investigation into the matter, it was learned that Mrs. Cutting was not the owner of the property, had never been involved in the property as owner, other than that she arranged for the purchase of said property from Ralph R. Thomas for her minor daughter, Sylvia A. Henderson who was, at that time, of the age of 15 years, and, therefore, it was necessary to file amended answers denying that the witness Cutting was the owner of the property and allege that the sole owner of the property, by virtue of the deed dated the 30th day of November, 1946, was Sylvia A. Henderson. This amendment was necessary to conform with the proof and there was no attempt during the trial of the case on the part of the appellants or appellees to prove otherwise—all parties acknowledging from the commencement of the trial that Sylvia A. Henderson was the vendee named in the deed of November 30, 1946. Reference is made here to the stipulation entered into between counsel at the commencement of the case and before any testimony was taken (TR 243, Line 11) wherein Mr. Davis of attorneys for appellees stipulated that Ralph Russell Thomas is the same person as the Ralph R. Thomas, and on August 1, 1948, a deed was recorded from Ralph R. Thomas to Sylvia A. Henderson and that deed, having been executed on the 30th day of November, 1946, conveying to Sylvia A. Henderson the property here in question, and that since the 4th day of August, 1948, Sylvia A. Henderson has been the record owner of the property in

question, and that throughout the remainder of the trial, no effort was made on the part of appellees to prove otherwise.

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**FIFTH POINT RAISED: 5. THAT THE TRIAL COURT ERRED IN AMENDING THE PLAINTIFFS' PLEADING SUA SPONTE AND BY JUDGMENT TO INCLUDE DEFENDANT, SYLVIA A. HENDERSON AS A PARTY DEFENDANT.**

Appellants, in response to appellees' brief on the Fifth Point Raised, re-assert all of the statements of fact and argument contained in appellants' original brief, together with the knowledge of the Court and the knowledge of the appellees as to the position of Sylvia A. Henderson in this case. The second paragraph on page 27 of appellees' brief reads as follows:

> "For the first time, on February 14, 1949, the appellees were informed of the claim of Sylvia A. Henderson as to the premises."

It had been previously pointed out in appellants' brief that the Court called attention to the fact that in the preliminary proceedings on the first morning of the trial. The Court, prior to proceeding with the case, said:

> "Looking over the pleadings, I notice that nowhere is Sylvia A. Henderson named as a party" (TR 242)

to which Mr. Davis, attorney for appellees, replied:

> "It is my recollection that in a pleading filed by Mr. McCarrey, that Sylvia A. Henderson appeared as a defendant and that her name ap-

> pears in the case, about 5 lines up from the bottom of the page"

and that in all or most of the complaints of the plaintiffs in intervention, Sylvia A. Henderson has been alleged to have an interest in the real property but that no one, at that time, took the trouble to determine whether the said Sylvia A. Henderson had ever been served with process in the matter or whether the said Sylvia A. Henderson appeared by guardian, general guardian, or guardian ad litem and it was not until the close of the trial when appellants made their motion that the case be dismissed insofar as Sylvia A. Henderson was concerned that the Court raised the question as to whether or not a guardian ad litem had been appointed and expressed the opinion that it was under the impression that such a guardian had been appointed at the commencement of the proceedings. All of this is more fully set forth in the original brief for appellants and we only assert here, as we have previously asserted, that the Court had no authority to make Sylvia Henderson a party defendant and "bring her before the Court" as it attempted to do by its Order at the close of the trial (TR 561, Lines 15-21) and that such an action was void and could not bring the said Sylvia Henderson into Court without service of process upon her and the Court was aware that no such process had been accomplished.

FIFTEENTH POINT RAISED: 15. THAT THE TRIAL COURT ERRED IN FINDING AGAINST THE EVIDENCE, THAT SYLVIA A. HENDERSON DID NOT EXECUTE A MORTGAGE TO RALPH THOMAS ON SAID REAL PROPERTY.

The point which seems to escape counsel for appellees with reference to the mortgage and the mortgage note is that the execution of the mortgage is the best evidence that delivery of the deed was made to Sylvia A. Henderson in the McCutcheon law office. Alaska is a "title theory state" insofar as the law of mortgages is involved and in order to convey property to a mortgagee, the mortgagor must have title. Title cannot be vested without delivery, constructive or actual. The transfer of title of the lot to Ralph R. Thomas by Sylvia A. Henderson by way of mortgage and his acceptance thereof presupposes prior vesting of title in Sylvia Henderson and thus delivery of the deed. Counsel for appellees comments that it is a strange thing that the original copy of the mortgage disappeared. Appellants see nothing strange about this, inasmuch as legal papers are often mislayed or destroyed where their value or purpose no longer exists. The Court also seems to doubt the existence of an original mortgage and makes the comment set forth in appellees' brief, page 59, taken from the Sup. TR, pages 583 and 584, but the Court also says in its next expression:

> "It seems to me that if the mortgage had actually been executed, it would have been produced because the defendant, Audrey Cutting produced in Court the note to secure payment of which the mortgage was given."

This note was an original, signed by Sylvia Henderson and Audrey Cutting, and referred to the mortgage. Counsel for appellees, assert as they must to support their theory, that there was no mortgage at any time and therefore infer that the copy of the mortgage produced in Court was perhaps fictitious. However, counsel for appellees concedes that the note was held at the bank with the deed (Appellees' brief, page 60, lines 21-23) and we submit that the original note being bona fide, then certainly the existence and execution of the mortgage could reasonably be presumed. Had the note been fictitious and had it been produced by defendant with Sylvia Henderson's signature thereon simply for the occasion, then obviously a fictitious original copy of the mortgage could have been likewise easily produced.

It is certainly no great strain of logic to conclude that if the defendant Sylvia Henderson, a 15 year old child, was permitted to sign a mortgage and a note in the office of an attorney at law, that the said child and her mother did not have the benefit of the best legal advice and therefore the further details of the transaction could have been grossly mishandled, including failure to record.

The appellees continually reiterate that they were not concerned with the interests of Sylvia Henderson in the property because the full requirements of the law had been met by naming Ralph R. Thomas in the pleadings as the record owner of the property at the time the construction was commenced. This

proposition is a fiction and cannot be supported by legal reason. On the 30th day of November, 1946, the said Ralph Russell Thomas, by Warranty Deed, conveyed his right, title, and interest in the property to Sylvia Henderson. Sometime on or before the 4th day of August, 1948, the said Thomas was paid the small balance remaining due on the note. Thomas had no interest whatever in the property and indicated no interest in the property or the construction thereon during the entire period from the 30th day of November, 1946 to the time he was served with process in August of 1948, and the said Thomas received, on or before the 4th day of August, 1948, payment in full. Therefore, at least from that date on he was totally removed from the transaction, and whatever the situation as to title before that date, from that date on, the property belonged solely to Sylvia Henderson. Thus the foreclosure procedure had no effect upon the said Thomas nor concerned him in any way and the liens and encumbrances could not diminish his estate as he had none. The only effect of the foreclosure procedure was to deprive the minor, Sylvia Henderson, of property which was hers by virtue of the deed and payment in full and she was so deprived without any effort on the part of appellees to give the Court jurisdiction over her by service of process. Thus, she was deprived of her property without due process of law and to assume, in order to support appellees' contention that it was Ralph R. Thomas or his property that was foreclosed upon and who was deprived of his property is to reduce this

matter to an absurdity. Appellees, whatever their information regarding the interests of Sylvia Henderson in the property prior to August 4, 1948, were well aware from that date on, and in any event, many months before trial that Sylvia Henderson was the sole owner of the property and they could have, long before trial, amended their complaints to make Sylvia Henderson a party and to secure service upon her and to petition the Court prior to trial to appoint a guardian ad litem. They failed in all of these easily accomplished elements of jurisdiction and now resort to a ridiculous fiction in order to deprive this minor of her property.

Counsel for appellees, in several instances in appellees' brief, infers that Sylvia Henderson's interest in the property could be adjudicated in a proper proceeding; that this appeal is not a proper proceeding and this contention, of course, is without foundation, because Sylvia Henderson was made a party to this action by order of the Court, whether legal or otherwise, and her property has been sold at a Marshal's sale and she has been deprived of the use and the income of the same and now has simply appealed to this Court from the judgment of the trial Court. Counsel's reference to the possibility of other and independent action on the part of Sylvia A. Henderson to protect her rights appears in the last paragraph of appellees' brief and also on page 73, first paragraph, wherein counsel says:

> "In other words, counsel contends that the judgment is a nullity as to Sylvia Henderson.

> Nevertheless, he has appealed from the judgment, although his authority to take an appeal on behalf of Sylvia Henderson has not been revealed. If he is correct in his contentions, then the appeal on behalf of Sylvia Henderson was not necessary, her rights have not been affected by the judgment, and can be asserted in any proper proceeding. There is no occasion for a reversal of the judgment as to Sylvia Henderson."

Counsel for appellees also comments on several occasions on the right of the personal judgment against Audrey Cutting as she was the person who contracted for the services of Russell Smith, the contractor, and was the person, according to the testimony of witnesses appearing for the Anchorage Sand and Gravel Company and the Ketchikan Spruce Mills, who authorized delivery of the materials to the project. Appellants have never denied the responsibility of Audrey Cutting in a proper proceedings against her for certain liabilities arising by reason of the construction on the lot which was done at her instance and request. However, such personal liability cannot be determined without determining the question of the responsibility of the contractor who, as has been pointed out in the original brief, made a contract whereby he guaranteed to hold Audrey Cutting safe from all liens, etc., appellants' brief, page 4, third paragraph, and disregarding this pledge and guarantee in his contract, became so insolvent financially and was so insolvent financially at the

commencement of this construction that it was necessary for him to make private arrangements with laborers to wait until the completion of the job before receiving their wages, and as an extra consideration for their so waiting, arranged to pay a bonus of 10 cents per hour on all time. This kind of contracting is inherently dangerous inasmuch as many a contingency could arise during or at the end of the construction whereby under the strict terms of the contract, payment would not be in order, i.e., failure to follow plans and specifications; failure to finish the building, etc., and thus no contractor could, under these circumstances, guarantee the property to be free from the filing of liens. It appears on an examination of the contract, and the conduct of the contractor, that the whole transaction was extremely shaky. The contingencies which could be expected to arise under such a contract and under such arrangements with laborers and materialmen, could arise in this case, i.e., the contractors exceeding his original bill as indicated by the claims of lien and his demand upon Mrs. Cutting for a sum of money greatly in excess of the contract price. Such a demand, as a matter of contract law, was not a demand for performance of the contract on the part of Audrey Cutting and she was not liable to pay promptly and immediately any such demand on the part of the contractor, and thus, by the very nature of the transaction and the conduct of the contractor, the filing of liens by the laborers and materialmen was inevitable. Therefore, in order to attempt to make

Audrey Cutting personally liable, proper proceedings would have to be brought against her with an interpretation of the contract and the events surrounding its performance or lack of performance on the part of the Court.

Counsel for appellees on page 12, last paragraph, states that the lien statute of Alaska is taken almost in toto from the Oregon statute. Thus, for a proper analysis of the lien law in Alaska, reference must be made to the Oregon law and authorities on the subject and an examination of such law reveals that a contract made by a person who does not own an interest in the land, cannot be the basis for the filing and foreclosure of mechanic's liens. We cite here an article entitled "Mechanic's Liens in Oregon" written by Morris J. Galen and appearing in the Oregon Law Review for June, 1950, at page 308 and we quote from said article as follows:

> "Generally, if the person contracting for the improvement does not own an interest in the land, liens for labor performed or materials furnished for the improvement will not attach to the land. This is clearly the law in Oregon."

and this statement is supported by the following authorities: *McFeron v. Doyens,* 116 Pac. 1063; *Equitable Savings & Loan Ass'n v. Hewitt,* 106 Pac. 447; *Litherland v. Cohn Real Estate Co.,* 100 Pac. 1 102, Pac. 303; *Sellwood Lumber Co. v. Monnell,* 38 Pac. 66; and *Pacific Spruce Corp. v. Oregon Portland Cement Co., et al.,* 286 Pac. 520, 522, 289 Pac. 489.

We further quote from page 319 of the Galen article:

> "Thus, in the case of extensive improvement of real property, such as the remodeling of a building, the claimant may be denied a lien for his labor, services, or material if the contracting party had no interest in the real property. The claimant may, of course, bring an action against the contracting party; or, if the facts show unjust enrichment, an action based on quasi contract may be brought against the owner of the real property benefited by the improvement."

Quoting from page 316 of the same article:

> "The contractor, as the agent of the owner. Sec. 67-101 provides that 'every contractor * * * or other person having charge of the construction * * * of any * * * improvement * * * shall be held to be the agent of the owner for the purpose of this act.' The Oregon court has held that the contractor, under sec. 67-101, is the special agent, and not the general agent of the owner. Therefore, persons who deal with the contractor generally will not be allowed liens unless the labor, services, or materials performed or furnished by them were authorized by the contract between the owner and the contractor. The Oregon court, in Beach v. Stamper (74 Pac. 208, 210) said: 'All authority to bind the owner on account of the building or buildings to be constructed must emanate from the original contract, which becomes the fundamental law for the government of all subcontracts, as they must be let under it and by virtue of the contractor's authority obtained through it.' Since the con-

tractor is merely a special agent, lienors who have dealt with him will be allowed liens only for the reasonable value of the labor, services, or materials performed or furnished by them, and not for the amount which the contractor agreed to pay them. The owner is not personally liable for the debts of the contractor, and no deficiency judgment may be rendered against the owner although the value of the property is not sufficient to satisfy all the claims against it."

On page 4 of appellees' brief, appellees have set forth a partial quotation of Section 26-1-2, Compiled Laws of Alaska 1949. The quotation, however, ends with the words

"* * * the land belonging to the person who caused the building or other improvement to be constructed, altered or repaired * * *"

The next clause of this sentence left out of the quotation is, however, of great importance and it is thought that this Court ought to have the benefit of this clause which reads as follows:

"but, if such person (person who caused the building or other improvement to be constructed) owned less than fee simple estate in such land, then only his interest therein shall be subject to such lien." (parentheses ours.)

Audrey Cutting obviously had no authority to order the construction of this building, had no authority to contract for the same and no authority whatever by virtue of law to cause any materials to be delivered or work to be performed thereon and

did so only upon an assumption of authority, without securing legal means of doing so, and her interest was not only less than a fee simple estate in such land but she had no interest whatever.

It will be noted that appellees continually insist and assert that there was an escrow agreement and in support of this assertion, they rely entirely upon the testimony of Audrey Cutting. The facts, upon investigation by her, showed there was no escrow whatever but simply a purchase money mortgage from Sylvia Henderson to Ralph Thomas with no escrow involved. Escrow, under the law, is composed of certain essential ingredients which must exist or escrow cannot arise. An escrow is a grant to be delivered to the grantee upon performance of a condition. The grantor gives the deed to the escrow holder or custodian, together with escrow instructions laying down the condition or conditions. The grantee performs the conditions, and the escrow holder delivers the deed to him. The escrow holder in the sale of property is at first the agent of both parties; when the condition is performed, he becomes the agent of each, i.e., of the grantee to deliver the deed and of the grantor to pay over the purchase money. It is generally true that a valid and binding contract must be entered into between the grantor and grantee in order to make a proper escrow. The contract must usually be in writing but has been known to exist without writing (*Tuso v. Green,* 229 Pac. 327). After performance by the grantee, however, title

passes to him as of the date of the delivery in escrow, as between the parties, title reverts back to the time when the grantee delivered the deed to the escrow holder (*McDonald v. Huff,* 19 Pac. 499). There is, however, in the record, no evidence of escrow beyond the statement of Mrs. Cutting which she later corrected when she discovered the mortgage and the mortgage note. The appellees, who were the plaintiffs in the original Court, could have easily, providing there had been an escrow, proved the same and established the fact beyond a doubt. However, they chose not to do so and relied entirely upon the testimony of Audrey Cutting. Appellees, on page 59 of their brief, first paragraph, state as follows:

> "Appellees contend that regardless of any presumptions which may arise from the execution of a deed as to its delivery and even, for the purposes of argument, admitting that 'the presumption of delivery by virtue of the deed placed the burden of proving nondelivery on the plaintiffs' as stated on page 56 of appellants' brief, they have met the burden of proving nondelivery of the deed until after the completion of the construction of the building on the premises and have justified the finding of the Court on that subject of which counsel complains."

We submit that the appellees have not met the burden of proving nondelivery of the deed and have not met the burden of proving escrow.

## CONCLUSION.

A review of the original brief, appellees' brief and all of the testimony contained in the Transcript of Record, indicates overwhelmingly that Sylvia A. Henderson, a minor, was deprived of her property without due process of law and that the judgment against her and the sale of her property following the judgment should not be permitted to stand but should be reversed. Likewise, the personal judgment against Audrey Cutting being entered by the Court in its judgment without regard to the contract between Audrey Cutting and the contractor Russell Smith, should be set aside and not allowed to stand.

Dated, Anchorage, Alaska,
January 31, 1951.

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